

DAVIS WRIGHT TREMAINE LLP

Stuart R. Dunwoody (WSBA #13948) (*pro hac vice*)
 Benjamin J. Byer (WSBA #38206) (*pro hac vice*)
 Xiang Li (CA SBN 291587)
 DAVIS WRIGHT TREMAINE LLP
 1201 Third Avenue, Suite 2200
 Seattle, Washington, 98101-3045
 Telephone: 206.622.3150
 Facsimile: 206.757.7700
 stuardunwoody@dwt.com
 benbyer@dwt.com
 xiangli@dwt.com

Sanjay Nangia (CA SBN 264986)
 DAVIS WRIGHT TREMAINE LLP
 505 Montgomery Street, Suite 800
 San Francisco, California 94111-6533
 Telephone: 415.276.6500
 Facsimile: 415.276.6599
 sanjaynangia@dwt.com

Attorneys for Defendant
 INSTITUTE FOR ENVIRONMENTAL HEALTH, INC.

IN THE UNITED STATES DISTRICT COURT
 THE NORTHERN DISTRICT OF CALIFORNIA

PRIMUS GROUP, INC.,

 Plaintiff/Counter-Defendant,

 v.
 INSTITUTE FOR ENVIRONMENTAL
 HEALTH, INC.,

 Defendant/Counterclaimant.

Case No. 18-cv-00005-WHO

Date: November 14, 2018
 Time: 10:00 a.m.

Judge: Hon. William H. Orrick

Trial Date: August 12, 2019

**INSTITUTE FOR ENVIRONMENTAL
 HEALTH, INC.'S OPENING CLAIM
 CONSTRUCTION BRIEF**

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND	1
A. Safety and Testing in the Food Industry	1
B. The Asserted Patents	2
C. This Lawsuit	4
III. LEGAL FRAMEWORK.....	6
IV. ARGUMENT	7
A. IEH’s Proposed Construction Stays True to the Claim Language, Specification, and Invention.....	7
B. Primus’s Proposed Broadening of the Claim Language Is Neither Anchored in the Claim Language Nor Supported by the Specification.	9
1. Primus’s Substitution of “Portions” for “Samples” Contradicts the Specification and the Word’s Meaning.	9
2. Primus Fails to Give Significance to the Terms “Separately” and “Independent” By Deleting Without Defining Them.	11
V. CONCLUSION	12

DAVIS WRIGHT TREMAINE LLP

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>Applied Materials, Inc. v. Advanced Semiconductor Materials Am., Inc.</i> , 98 F.3d 1563 (Fed. Cir. 1996).....	8
<i>Comark Commc'ns, Inc. v. Harris Corp.</i> , 156 F.3d 1182 (Fed. Cir. 1998).....	6
<i>Electro Med. Sys., S.A. v. Cooper Life Scis., Inc.</i> , 34 F.3d 1048 (Fed. Cir. 1994).....	6, 7
<i>Huawei Techs., Co. v. Samsung Elecs. Co.</i> , No. 3:16-cv-02787-WHO, slip op. (N.D. Cal. Aug. 31, 2017).....	6, 8
<i>In re Power Integrations, Inc.</i> , 884 F.3d 1370 (Fed. Cir. 2018).....	11
<i>Inverness Med. Switzerland GmbH v. Princeton Biomeditech Corp.</i> , 309 F.3d 1365 (Fed. Cir. 2002).....	6
<i>Lucent Techs., Inc. v. Gateway, Inc.</i> , 525 F.3d 1200 (Fed. Cir. 2008).....	7
<i>Markman v. Westview Instruments, Inc.</i> , 517 U.S. 370 (1996).....	6
<i>Markman v. Westview Instruments, Inc.</i> , 52 F.3d 967 (Fed. Cir. 1995).....	7
<i>Merck & Co. v. Teva Pharm. USA, Inc.</i> , 395 F.3d 1364 (Fed. Cir. 2005).....	11
<i>Millipore Corp. v. W.L. Gore Assocs., Inc.</i> , 2012 WL 5250386 (D.N.J. Oct. 24, 2012).....	11
<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005).....	6, 7
<i>Renishaw PLC v. Marposs Societa' per Azioni</i> , 158 F.3d 1243 (Fed. Cir. 1998).....	7
<i>Thorner v. Sony Corp. Entm't Am. LLC</i> , 669 F.3d 1362 (Fed. Cir. 2012).....	6
<i>Vitronics Corp. v. Conceptronic, Inc.</i> , 90 F.3d 1576 (Fed. Cir. 1996).....	6

1 *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*,
2 520 U.S. 17 (1997) 11

3 **Other Authorities**

4 U.S. Patent No. 8,822,143 *passim*

5 U.S. Patent No. 9,637,771 *passim*

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
DAVIS WRIGHT TREMAINE LLP

I. INTRODUCTION

The Asserted Patents describe improved methods of testing for microbiological contamination in products such as food. The parties' claim construction dispute addresses Primus's attempt to broaden a single phrase in a misguided effort to support its invalidity theory. Primus's proposed construction is flawed in at least two ways. First, Primus replaces a claim term with a word having a different meaning. Thus, rather than defining that claim term, Primus proposes changing it. Second, Primus's construction entirely ignores other claim terms. Rather than defining those claim terms, Primus simply deletes them. In contrast, IEH's proposed construction is anchored in the claim language, specification, and invention. Accordingly, IEH respectfully requests that the Court adopt IEH's proposed construction.

II. FACTUAL BACKGROUND

A. Safety and Testing in the Food Industry

IEH provides the food industry with testing for microbiological contamination in food. Producers, manufacturers, and regulators strive to improve the safety and quality of the food, ensuring that it is free of harmful microbiological contamination, such as *E. coli*, *Listeria*, and *Salmonella*. '143 Patent Col. 1:49-50; '771 Patent Col. 1:56-57. Testing for contamination must be both accurate and sufficiently inexpensive to enable its commercial use. '143 Patent Col. 3:46-52; '771 Patent Col. 3:55-62.

Commercial food production often subdivides food into large units of production known as "lots." '143 Patent Col. 4:65-5:2; '771 Patent Col. 5:9-13. For example, in the context of spinach, a "lot" of harvested spinach may consist of multiple pallets, each pallet containing dozens of boxes of spinach:

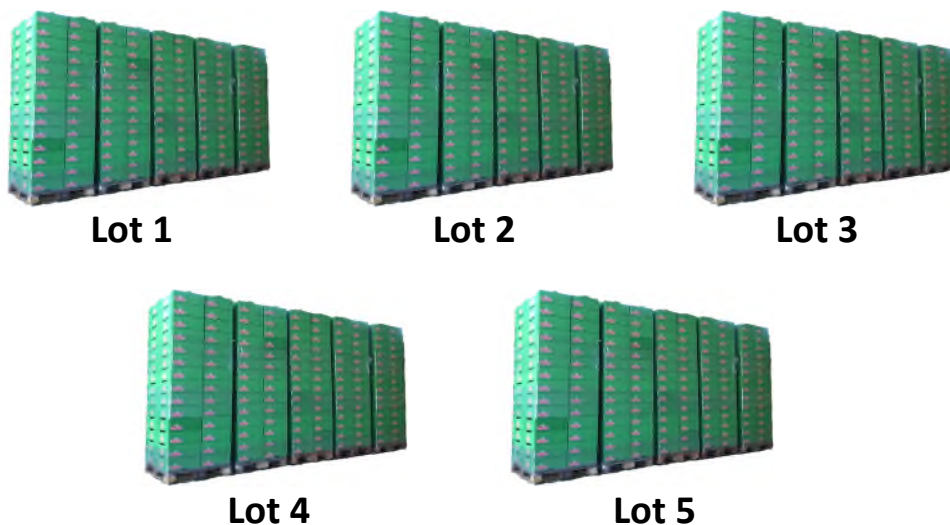


Before a lot of food is released into commerce, producers want to ensure that no portion of the lot is contaminated with, for example, *E. coli*. But producers cannot test every leaf of spinach in the lot: if they did, there would be nothing left to sell. Instead, producers collect samples of spinach from across the lot and test those samples, assuming that, if they contain no contamination, the entire lot contains no contamination. '143 Patent Col. 2:25-28, 2:58-3:3; '771 Patent Col. 2:33-36, 3:1-13. But because microbiological contamination is not evenly distributed throughout the lot, producers must ensure they use "a typical or average sample that is representative of the test lot . . . being sampled." '143 Patent Col. 5:65-6:2; '771 Patent Col. 6:7-11.

B. The Asserted Patents

In or around 2003 and 2004, IEH's CEO and President, Mansour Samadpour, invented a new method of testing for contamination that has since revolutionized the food industry, though the method is not limited to testing in food products. Dr. Samadpour patented that method in U.S. Patent Nos. 8,822,143 and 9,637,771 (collectively, the "Asserted Patents").

The patented method may be used to test simultaneously multiple lots of food for contamination. In the spinach example, the patented method may be used to test simultaneously five lots of spinach:

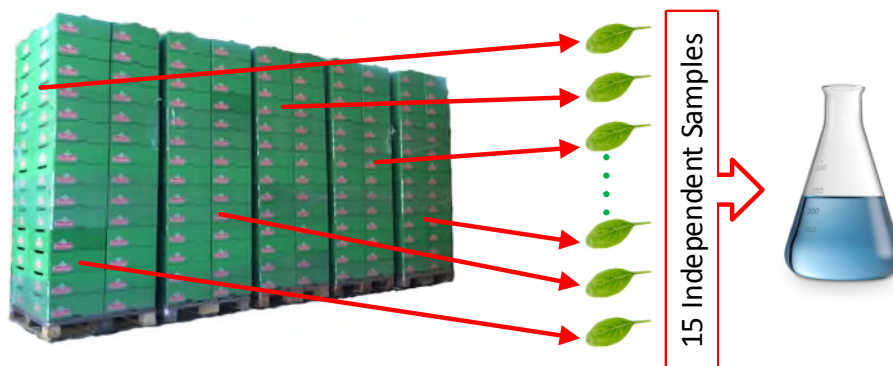


The patented method begins by “separately collecting multiple independent samples” from the first lot. ’143 Patent Claim 1(a); ’771 Patent Claim 1(a). In the spinach example, “multiple independent samples” of spinach are collected across the first lot:



Those samples are combined together to form a composite sample representative of the first lot. ’143 Patent Claim 1(b); ’771 Patent Claim 1(b). That composite sample is then added to an enrichment “broth” containing nutrients allowing the target microbe (*e.g.*, *E. coli*) to grow. ’143 Patent Claim 1(c); ’771 Patent Claim 1(c). This enriched composite may be more easily tested for contamination.

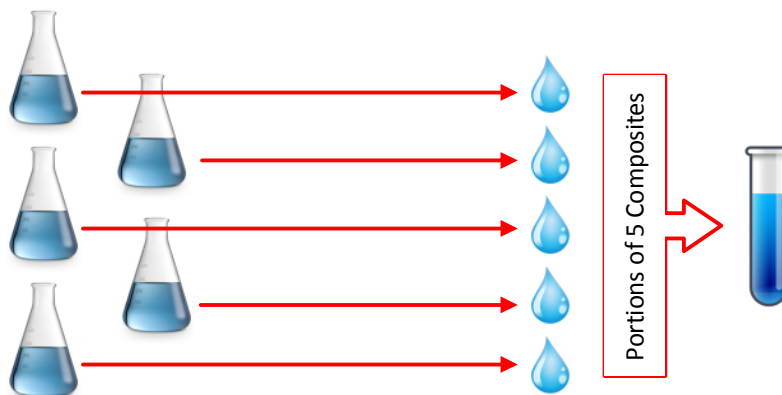
For example, for the lot of spinach being tested for *E. coli*, 15 samples may be combined together into a single composite, which is added to an enrichment broth and enriched for *E. coli*:



This process is then repeated for each of the lots to create multiple enriched composites, one for each lot. Continuing with the example of five lots of spinach, each of the five lots is separately sampled to create five enriched composites, in which each enriched composite represents one of the different lots.

Next, the patented method combines a portion from each of those five enriched composites to create a single pooled sample representing all five lots. ’143 Patent Claim 1(d);

'771 Patent Claim 1(d). In the spinach example, portions of each enriched composite are taken to form a single pooled sample:



The remaining portions of those five enriched composites are set aside for potential follow-up testing. '143 Patent Claim 1(e); '771 Patent Claim 1(e). Finally, the pooled sample is tested to determine whether it contains the target microbe, such as *E. coli* in the spinach example. *Id.*

The Asserted Patents teach that, if just one of the lots is contaminated, testing the pooled sample would detect contamination. *Id.* Thus, if the assay does not detect the microbe, **all five lots** are considered free of *E. coli*. *Id.* The Asserted Patents refer to this step as “validating” the test lots. *Id.* This allows five lots to be analyzed using a single test.

But if the test detects contamination in the pooled sample, not all five lots of spinach necessarily have the microbe and need to be destroyed. *Id.* Instead, the remaining portions of the five enriched composites may be separately tested to pinpoint the contaminated lot or lots. *Id.*

Dr. Samadpour discovered that, in most instances, the contamination is restricted to only one or two of the five lots. Thus, Dr. Samadpour’s invention results in substantial net savings for food producers because less product is destroyed (or otherwise diverted), while simultaneously maintaining the safety of the food chain.

C. This Lawsuit

In response to IEH’s assertion that Primus infringes the Asserted Patents, Primus admitted it practices all but one claim element; Primus disputes only whether it “validates” lots when they test negative. Primus’s Answer to Counterclaim ¶¶ 28, 40 (ECF No. 29). But the parties agree on the construction of the term “validate,” along with two additional terms:

	<u>Claim Term</u>	<u>Agreement</u>
1.	Validate	To “validate” means to “determine that a particular sample tests negative using the detection assay.”
2.	Enriching / enriched	“Enriching” means “incubating a sample under conditions suitable to allow levels of a target agent/organism that is present to reach detectable levels and become uniform or substantially uniform.”
3.	Selective agent	A “selective agent” means an “agent that inhibits competing non-target microbe(s).”

Joint Claim Construction and Prehearing Statement at 2 (ECF No. 38).

Primus focuses its defense on its contention that prior art renders the Asserted Patents anticipated or obvious. Primus’s Corrected First Amended Complaint ¶ 19 (ECF No. 23). Primus’s attempt to broaden the Asserted Patents to support this defense forms the basis for the parties’ claim construction dispute.

The parties’ sole claim construction dispute arises from the following claim language:

<u>Claim Term</u> ¹	<u>IEH’s Proposed Construction</u>	<u>Primus’s Proposed Construction</u>
Separately collecting multiple independent samples from each of multiple separate lots	Collecting multiple samples from different, non-contiguous locations from each of multiple separate lots	Collecting multiple portions from each of multiple lots

Joint Claim Construction and Prehearing Statement at 2.

The thrust of the parties’ competing constructions appears to turn on whether this claim language covers “isolated collecting,” *e.g.*, collecting a single handful of spinach leaves and considering all of the leaves “multiple independent samples.” IEH proposes a construction that excludes isolated collecting while Primus offers a construction intended to encompass isolated collecting.

¹ The parties request that the Court construe the following claim language: “separately collecting multiple independent samples from each of multiple separate [lots / test lots / single-unit production lots / single production lots].” Joint Claim Construction and Prehearing Statement at 2. For simplicity, however, IEH refers only to “lots,” though references in this brief to “lots” in the disputed claim language can be substituted for “test lots,” “single-unit production lots,” or “single production lots” without affecting the competing proposed constructions before the Court.

III. LEGAL FRAMEWORK

Claim construction is a matter of law. *See Huawei Techs., Co. v. Samsung Elecs. Co.*, No. 3:16-cv-02787-WHO, slip op. at 2-3 (N.D. Cal. Aug. 31, 2017) (citing *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996); *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). Terms contained in claims are “generally given their ordinary and customary meaning.” *Vitronics*, 90 F.3d at 1582. In determining the proper construction of a claim, the Court begins with the intrinsic evidence of record, consisting of the claim language, the patent specification, and, if in evidence, the prosecution history. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005); *see also Vitronics*, 90 F.3d at 1582. “A claim term used in multiple claims should be construed consistently . . .” *Inverness Med. Switzerland GmbH v. Princeton Biomeditech Corp.*, 309 F.3d 1365, 1371 (Fed. Cir. 2002).

“The appropriate starting point . . . is always with the language of the asserted claim itself.” *Comark Commc’ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1186 (Fed. Cir. 1998). “[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application.” *Phillips*, 415 F.3d at 1313. “There are only two exceptions to this general rule: 1) when a patentee sets out a definition and acts as his own lexicographer, or 2) when the patentee disavows the full scope of a claim term either in the specification or during prosecution.” *Thorner v. Sony Corp. Entm’t Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012).

“Importantly, the person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.” *Phillips*, 415 F.3d at 1313. “Claims speak to those skilled in the art,” but “[w]hen the meaning of words in a claim is in dispute, the specification and prosecution history can provide relevant information about the scope and meaning of the claim.” *Electro Med. Sys., S.A. v. Cooper Life Scis., Inc.*, 34 F.3d 1048, 1054 (Fed. Cir. 1994). “[T]he specification is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.” *Vitronics*, 90 F.3d at 1582. “However, claims are not to be interpreted by adding

limitations appearing only in the specification.” *Electro Med.*, 34 F.3d at 1054. “Thus, although the specifications may well indicate that certain embodiments are preferred, particular embodiments appearing in a specification will not be read into the claims when the claim language is broader than such embodiments.” *Id.* Conversely, “where [] the claim language is unambiguous, [the Federal Circuit has] construed the claims to exclude all disclosed embodiments.” *Lucent Techs., Inc. v. Gateway, Inc.*, 525 F.3d 1200, 1215-16 (Fed. Cir. 2008). “[T]he description may act as a sort of dictionary, which explains the invention and may define terms used in the claims,” and the “patentee is free to be his own lexicographer,” but “any special definition given to a word must be clearly defined in the specification.” *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995), *aff’d*, 517 U.S. 370 (1996).

On the other hand, it is a fundamental rule that “claims must be construed so as to be consistent with the specification.” *Phillips*, 415 F.3d at 1316. “The construction that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction.” *Renishaw PLC v. Marposs Societa’ per Azioni*, 158 F.3d 1243, 1250 (Fed. Cir. 1998).

IV. ARGUMENT

A. IEH’s Proposed Construction Stays True to the Claim Language, Specification, and Invention.

The Court should accept IEH’s proposed construction because it (1) clarifies the meaning of the disputed claim language without ignoring limitations, (2) comports with the intrinsic evidence, and (3) stays true to the scope of the invention and problem solved.

First, the disputed phrase contains three words that exclude isolated collecting: “separately,” “independent,” and “samples.” The terms “separately” and “independent” require that the samples collected cannot be physically contiguous. In other words, multiple leaves of spinach collected in a single handful are all touching each other, and are thus neither “separate” nor “independent.” Similarly, the inherent meaning of a “sample” implies a collection of elements that would be **representative** of the lot being sampled. Because isolated collection

1 inherently gathers only elements from a single, isolated location, those elements are not
2 “samples” of the lot.

3 **Second**, the specification suggests that sampling should be representative of the lot
4 sampled. A construction that requires “collecting multiple samples from different, non-
5 contiguous locations” recognizes the problem that “microbial contaminants are unevenly spread
6 throughout the [lots],” and any meaningful sampling should obtain samples from non-contiguous
7 locations “representative” of the lot. *See, e.g.*, ’143 Patent Col. 5:65-6:2; ’771 Patent Col. 6:7-11
8 (“In preferred embodiments, the number and selection of single product portions to be combined
9 conform to statistical-based sampling plans which seek to form a typical or average sample that
10 is **representative of the test lot . . . being sampled.**” (emphasis added)); ’143 Patent Col. 3:16-21;
11 ’771 Patent Col. 3:26-30 (recognizing that “microbial contaminants are unevenly spread
12 throughout the products, and in many instances the levels of contamination are minute and may
13 be present on very small portions of the products in each subplot”); ’143 Patent Col. 3:22-28; ’771
14 Patent Col. 3:35-36 (recognizing that “microbial contaminants are not uniformly present
15 throughout the products”). Thus, the specification also confirms that “separately collecting
16 multiple independent samples” requires collecting multiple samples from different, non-
17 contiguous locations.

18 **Third**, the specification’s description of the purpose of the invention further reinforces
19 the propriety of IEH’s proposed construction. As this Court recognizes, claim construction in
20 light of the “whole purpose of the invention” is appropriate when such a “construction is the only
21 way to capture the scope of the actual invention” and to guard against “the claim language . . .
22 becom[ing] divorced from what the specification conveys is the invention.” *Huawei Techs.* slip
23 op. at 14 (internal quotation marks omitted); *see also Applied Materials, Inc. v. Advanced*
24 *Semiconductor Materials Am., Inc.*, 98 F.3d 1563, 1573 (Fed. Cir. 1996) (interpreting “cold
25 purge” in light of the problem solved by the patent). Here, the scope of the invention and
26 problem solved rely on representative sampling so that the testing method can accurately detect
27 contamination. As the Asserted Patents recognize, only “a very small portion” of a lot may be
28 contaminated. ’143 Patent Col. 3:16-21; ’771 Patent Col. 3:25-36. When sampling is not

representative and collection is performed in an isolated manner, contamination can easily escape sampling and thus detection. Therefore, if the claim language were construed to cover isolated collecting, the accuracy and reliability of the testing method would be lost, and the purpose of the invention defeated. IEH's proposed construction is the only way to capture the scope of the invention and problem solved.

B. Primus's Proposed Broadening of the Claim Language Is Neither Anchored in the Claim Language Nor Supported by the Specification.

A simple redline of the disputed phrase and Primus's proposed construction illustrates that Primus's construction replaces one limitation with new and broader language and removes two other limitations entirely:

~~Separately~~ collecting multiple ~~independent samples~~ portions from each of multiple ~~separate~~ lots

This is a transparent attempt to transform the claim language in view of Primus's invalidity defense rather than to define the disputed language in view of the Asserted Patents.

The Court should reject Primus's proposed construction for two independent reasons. First, Primus replaces the word "samples" with "portions." Although a "sample" may be made up of "portions," Primus cites no evidence suggesting a "sample" is nothing more than a "portion." Second, Primus deletes multiple claim terms without otherwise accounting for their meaning. A proper construction accounts for all of the claim limitations, rather than simply discarding those a party finds unhelpful to its defenses.

1. Primus's Substitution of "Portions" for "Samples" Contradicts the Specification and the Word's Meaning.

The claim language requires collecting "samples." Primus's construction substitutes the word "portions" for "samples" so the disputed phrase would require collecting "portions." But "samples" and "portions" are not synonyms. Rather than defining the word "samples," the word "portions" strips away the bulk of its meaning.

Although both "sample" and "portion" describe part of a larger collection, a "sample" is made up of a particular type of "portions." Namely, the word "sample"—inherently and as used in the specification—conveys the sense of a representative selection of a whole. Indeed, the

1 Asserted Patents inherently recognize this distinction by using the terms “samples” and
 2 “portions” differently. For example, the Asserted Patents broadly define the word “portion” by
 3 stating that “[t]he term ‘product portion’ as used herein refers to a product piece (e.g., a piece of
 4 solid beef trim, etc.), aliquot of product (e.g., a volume of liquid juice) or weight of product (e.g.,
 5 a weight of semi-solid pudding).” ’143 Patent Col. 5:52-55; ’771 Patent Col. 5:61-64. And
 6 when “portions” is synonymous with another term in the Asserted Patents, the specification says
 7 so. ’143 Patent Col. 5:44-45; ’771 Patent Col. 5:53-54 (“In particular instances, portions are
 8 synonymous with specimens.”).

9 Conversely, the specification illustrates that a sample is made up of a particular type of
 10 portions:

11 [T]he number and selection of single product **portions** to be
 12 combined [should] conform to statistical-based sampling plans
 13 which seek **to form a typical or average sample that is**
representative of the test lot . . . being sampled.

14 ’143 Patent Col. 5:65-6:2; ’771 Patent Col. 6:7-11 (emphasis added); *see also* ’143 Patent Col.
 15 2:12-15; ’771 Patent Col. 2:20-22 (a “common feature” of “sampling plans” is to take “several
 16 samples **representing** [the] production lots” (emphasis added)).

17 Likewise, the Asserted Patents define “test lot sample” as “a sample formed by
 18 combining multiple product portions” ’143 Patent Col. 6:3-9; ’771 Patent Col. 6:12-17.
 19 Indeed, the specification repeatedly uses phrases confirming a sample is made up of a particular
 20 type of portions:

- 21 • “For production lot samples, the number of portions/pieces combined
 22 many be essentially any number, but preferably is selected so as to
 23 conform to statistical-based sampling plans.” ’143 Patent Col. 6:10-12;
 24 ’771 Patent Col. 6:18-21.
- 25 • “[T]he number of independent product portions is selected so as to yield a
 26 sample size that is equal to or greater than that required by the subsequent
 27 analysis to be applied.” ’143 Patent Col. 6:18-20; ’771 Patent Col. 6:26-
 28 29.

- “With respect to testing each reportable lot . . . , a plurality of pieces/portions of sample are separately collected from each single reportable lot” ’143 Patent Col. 4:14-17; ’771 Patent Col. 4:24-27.

Primus’s proposed construction directly contradicts the specification and should therefore be rejected.

2. Primus Fails to Give Significance to the Terms “Separately” and “Independent” By Deleting Without Defining Them.

“*Separately* collecting multiple *independent* samples” requires more than, as Primus proposes, “collecting multiple portions.” As the redline comparison above shows, Primus’s construction simply *deletes* words instead of defining them.

Primus’s proposed construction deletes (1) “separately” from “separately collecting”; (2) “independent” from “multiple independent samples”; and (3) “separate” from “multiple separate lots.” This approach runs directly afoul of the well-established canon that a “claim construction that gives meaning to all the terms of the claim is preferred over one that does not do so.” *Merck & Co. v. Teva Pharm. USA, Inc.*, 395 F.3d 1364, 1372 (Fed. Cir. 2005); *see also In re Power Integrations, Inc.*, 884 F.3d 1370, 1376 (Fed. Cir. 2018). “Each element contained in a patent claim is deemed material to defining the scope of the patented invention” *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 29 (1997). Courts thus reject proposed constructions that do no more than delete claim terms from the disputed language. *See Millipore Corp. v. W.L. Gore Assocs., Inc.*, 2012 WL 5250386, at *8 (D.N.J. Oct. 24, 2012) (rejecting proposed construction that “merely deletes the term ‘cutting’ from the language in the claims” because the deletion does not add any information to assist a trier of fact).

Having deleted multiple claim terms, Primus’s proposed construction ignores the significance of the terms “separately,” “independent,” and “separate,” which underlie the heart of the parties’ dispute over whether the claim language covers isolated collecting. Namely, “separately collecting” means more than “collecting.” Without support, Primus proposes simply vitiating the “separately” claim limitation. Likewise, the plain and ordinary meaning of “multiple” is more than one; “independent” thus contributes an additional limitation to the claim

beyond “multiple.” Yet Primus also ignores the “multiple” claim limitation. Likewise, Primus removes the word “separate” from “multiple separate lots.” Unlike IEH’s proposed construction, Primus fails to give significance to these three terms. Its proposed construction should therefore be rejected.

V. CONCLUSION

For the reasons state above, IEH respectfully requests the Court adopt its proposed construction.

DAVIS WRIGHT TREMAINE LLP

DATED: September 14, 2018

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: /s/ Stuart R. Dunwoody
Stuart R. Dunwoody

Stuart R. Dunwoody (WSBA #13948) (*pro hac vice*)
Benjamin J. Byer (WSBA #38206) (*pro hac vice*)
Xiang Li (CA SBN 291587)
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington, 98101-3045
Tel: 206.622.3150
Fax: 206.757.7700

Sanjay Nangia (CA SBN 264986)
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, California 94111-6533
Tel: 415.276.6500
Fax: 415.276.6599

Attorneys for Defendant
INSTITUTE FOR ENVIRONMENTAL
HEALTH, INC.

DAVIS WRIGHT TREMAINE LLP